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No. 00-507

In The

Supreme Court of the United States

THE CHICKASAW NATION and
THE CHOCTAW NATION OF OKLAHOMA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY AND LITTLE SIX, INC. IN SUPPORT OF DENIAL OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37 of this Court, the Shakopee Mdewakanton Sioux Community, a federally recognized Indian tribal government, and Little Six, Inc., an arm and instrumentality of the Community, hereby move for leave to file the attached brief *amicus curiae* submitted in support of denial of certiorari. Consent for filing this brief was given by Respondent and is being filed with the Clerk. Consent was requested of Petitioners but no response was provided by the time of printing of the brief.

As more fully explained in the brief for which leave to file is sought, the Community and Little Six are parties to *Little Six, Inc. v. United States*, 210 F.3d 1361 (Fed. Cir. 2000), reproduced at Pet. App. p. 101a, which held that the federal wagering taxes imposed under Chapter 35 of the Internal Revenue Code do not apply to pull-tab games conducted by Indian tribal governments. The petition for certiorari discusses *Little Six* at length and asserts that there is a conflict between *Little Six* and the decision with respect to which certiorari is sought that warrants the grant of certiorari. The time period for the United States to file a petition for a writ of certiorari in *Little Six* has not yet expired. If the Court decides to grant certiorari in this case, the Court's decision on the merits could affect the outcome of *Little Six*. The Community and Little Six thus have a direct and substantial interest in this Court's disposition of the petition for certiorari. The Community and Little Six, moreover, bring to this Court arguments made by neither Petitioners nor Respondent that the Community and Little Six believe

would assist the Court in ruling on the petition for certiorari, and requests that its motion be granted.

Respectfully submitted,

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December 29, 2000

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Interest of the *Amici Curiae*	1
Statement with Regard to the Petition	5
Reasons for Denying the Writ	9
Conclusion	14

TABLE OF AUTHORITIES

Page

CASES

Choate v. Trapp, 224 U.S. 665 (1912) 3

Choctaw Nation of Oklahoma v. United States, 99-1 U.S. Tax Cas. (CCH) ¶ 70,118 (E.D. Okla. 1999) ...6, 7

Cook v. United States, 86 F.3d 1095 (Fed. Cir.), *cert. denied*, 519 U.S. 932 (1996) 4

County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251 (1992) 3

Little Six, Inc. v. United States, 210 F.3d 1361 (Fed. Cir. 2000) 1, 4, 10, 11

Lower Sioux Indian Community in Minnesota v. United States, Civ. No. 99-911 (D. Minn. filed Jun. 16, 1999) 12

Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985) 3

Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1998) 10

Squire v. Capoeman, 351 U.S. 1 (1956).....3, 4, 11, 12

The Chickasaw Nation v. United States, 208 F.3d 871 (10th Cir. 2000).....8, 9

The Chickasaw Nation v. United States, 99-1 U.S. Tax Cas. (CCH) ¶ 70,121 (E.D. Okla. 1998) 7

United States v. Alvarez-Sanchez, 511 U.S. 350 (1994) 10

United States v. Smith, 781 F.2d 184 (10th Cir. 1986) 10

United States v. Williams, 504 U.S. 36 (1992) 9

Yee v. City of Escondido, 503 U.S. 519 (1992) 9, 10

TABLE OF AUTHORITIES – Continued

Page

STATUTES

25 U.S.C. § 2701 *et seq*..... 1

25 U.S.C. § 2702(1) 2

25 U.S.C. § 2710(d)(3)..... 2

25 U.S.C. § 2719(d) ..... *passim*

26 U.S.C. § 1441..... 2

26 U.S.C. § 3402(q) 2

26 U.S.C. ch. 35 .....1, 2, 3, 5, 9, 10, 11

26 U.S.C. § 4401.....1, 6

26 U.S.C. § 4402(3) 2

26 U.S.C. § 4411.....1, 6

26 U.S.C. § 4421..... 6

26 U.S.C. § 6041..... 2

26 U.S.C. § 6050I.....2, 3

26 U.S.C. § 7701(a)(1).....6, 7

28 U.S.C. § 1346(a)(1)..... 12

OTHER AUTHORITIES

S. 555, 100th Cong., 1st Sess. (1987)..... 11

H.R. Rep. No. 488, 99th Cong., 2d Sess. 12 (1986) 11

127 Cong. Rec. S2270-71 (Feb. 17, 1981) 13

127 Cong. Rec. S32084-85 (Dec. 16, 1981)..... 13

IRS Tech. Adv. Mem. 9229005 (CCH) (Apr. 2, 1992) 13

www.irs.ustreas.gov/tax_stats/soi/exc_exc.html, file 00EX20TE.EXE 13

INTEREST OF THE *AMICI CURIAE*[1]

The Shakopee Mdewakanton Sioux (Dakota) Community is a federally recognized Indian tribal government. Little Six, Inc. is an arm and instrumentality of the Community established to operate the Community's gaming operations, which have been conducted since the early 1980s to raise revenues for the tribal government. The Community and Little Six are sometimes referred to collectively as the "Community."

The Community and Little Six are parties to *Little Six, Inc. v. United States*, 210 F.3d 1361 (Fed. Cir. 2000), reproduced at Pet. App. p. 101a. In *Little Six*, a unanimous panel of the U.S. Court of Appeals for the Federal Circuit, a court of nationwide jurisdiction, held in a straightforward and well-reasoned opinion that the 0.25% excise tax and the $50 annual occupational tax imposed under Sections 4401 and 4411 in Chapter 35 of the Internal Revenue Code (the "Code") do not apply to pull-tab games conducted by Indian tribal governments under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* (1994 & Supp. 1997) ("IGRA").[2] IGRA was enacted in the fall of 1988 to foster the tribal governments' revenue-raising

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[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, its members, or their counsel made a monetary contribution to the preparation or submission of the brief.

[2] The panel's opinion was authored by Judge Lourie and joined by Chief Judge Mayer and Judge Schall.

efforts.[3] The Federal Circuit grounded its decision on an interpretation of Section 2719(d) of IGRA, which provides (with emphasis supplied by the court):

> (1) The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, and 6050I, *and chapter 35 of such Code*) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations *shall apply to Indian gaming operations* conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is in effect, *in the same manner as such provisions apply to State gaming and wagering operations.*
>
> (2) The provisions of this subsection shall apply notwithstanding any other provision of law enacted before, on, or after October 17, 1988, unless such other provision of law specifically cites this subsection.

The Federal Circuit concluded that, because Chapter 35 provides an exemption for state lotteries (in its Section 4402(3)) and is one of the specific Code provisions which Section 2719(d) explicitly provides "shall apply to Indian gaming operations . . . in the same manner as such provisions apply to State gaming and wagering operations," Section 2719(d) should be construed to provide an

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[3] IGRA's stated central purpose is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments. . . . ," 25 U.S.C. § 2702(1), three longstanding goals of federal Indian law.

exemption for pull-tab games and other lotteries conducted by Indian tribes.

In the Federal Circuit, the United States had contended that Section 2719(d) only involves provisions concerning the reporting and withholding of taxes with respect to winnings, notwithstanding the explicit references in the statute to Chapter 35 and Section 6050I, two provisions which have nothing to do with winnings.[4] The Federal Circuit rejected the United States's construction and decided in favor of the Community, based on a straightforward analysis of statutory language and legislative history and on the Indian canon of statutory construction which has been applied in numerous decisions of this Court from *Choate v. Trapp*, 224 U.S. 665 (1912), *Squire v. Capoeman*, 351 U.S. 1 (1956), and *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985), through *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992). The Indian canon requires generally that statutes enacted to benefit Indian tribes or Indians must be construed liberally, with ambiguities resolved in favor of the Indians. In the federal tax area, the canon requires specifically that statutes or treaties that contain language that can reasonably be construed to confer a federal tax exemption for Indian tribes or Indians should be so construed in their favor.

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[4] Chapter 35 taxes only the operator of the gaming facility, not the players, and the tax is based on gross wagers, not winnings. Section 6050I requires a gaming operator to report cash receipts of $10,000 or more. It does not require reporting of cash payments to players, and therefore is also unrelated to "winnings."

Capoeman, 351 U.S. at 6-7; *Cook v. United States*, 86 F.3d 1095, 1097 (Fed. Cir.), *cert. denied*, 519 U.S. 932 (1996).

On October 12, 2000, after the Chickasaw Nation and the Choctaw Nation (the "Nations") filed their petition for a writ of certiorari in this case, the Federal Circuit denied the United States's petition for rehearing *en banc* in *Little Six*.[5] The time period for the United States to file a petition for a writ of certiorari in *Little Six* has not yet expired. If the Court decides to grant the writ of certiorari in this case, the Court's decision on the merits could affect the outcome of *Little Six*.

We file this brief in order to call the Court's attention to an important misstatement in the petition that bears on what issues would properly be before the Court if certiorari were granted. In addition, we wish to point out to the Court a number of additional reasons why we believe certiorari should not be granted. These relevant matters have not been addressed by the Nations in their petition or by the United States in its brief acquiescing in the petition.

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[5] Three of the court's twelve active judges dissented from the denial of rehearing. Judge Dyk authored the dissenting opinion, which was joined by Judges Newman and Plager.

STATEMENT WITH REGARD TO THE PETITION

The Nations have represented in their petition that "[i]n their appeals, the Nations asserted that [Section 2719(d) of IGRA] provided Indian tribes with the same wagering tax exemption afforded by Chapter 35 of the Internal Revenue Code . . . to states engaged in wagering operations." Pet. p. 3. This statement by the Nations, repeated by the United States in its brief (p. 3), is incorrect. The Nations did not raise the Section 2719(d) exemption question in their appeals to the Tenth Circuit. In fact, the Nations contended – just as the United States did – that Section 2719(d) *only* concerns winnings provisions.[6]

From the outset, the Nations chose to pursue their cases on entirely different legal grounds than the ground on which the Community prevailed in the Federal Circuit. The Nations' central argument in the district court was that Indian tribes are not taxable entities under federal common law, and that neither the Internal Revenue Code nor IGRA altered that result by imposing the federal wagering taxes on the tribes.[7] Noting that Sections

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[6] The Nations' argument before the Tenth Circuit regarding Section 2719(d) is set forth in Appellant's Opening Brief dated June 23, 1999 ("Chickasaw Br."), filed in 10th Cir. No. 99-7042, pp. 20-21; Appellant's Reply Brief dated Sept. 28, 1999 ("Chickasaw Reply Br."), filed in 10th Cir. No. 99-7042, pp. 8-9; Appellant's Opening Brief dated August 10, 1999 ("Choctaw Br."), filed in 10th Cir. No. 99-7072, pp. 20-22; and Appellant's Reply Brief dated Oct. 12, 1999 ("Choctaw Reply Br."), filed in 10th Cir. No. 99-7072, pp. 8-9.

[7] As in the Tenth Circuit, both Nations were represented by the same counsel in the district court and each Nation made the same arguments as the other. The Chickasaw Nations' district

4401 and 4411 of the Code impose the federal wagering taxes only on "persons" as defined in Section 7701(a)(1) of the Code, the Nations argued that Indian tribes are not "persons" under this definition. D. Ct. Br. pp. 10-13. Section 2719(d) of IGRA also did not alter the common law result, the Nations argued, because that provision applies the Code "only to the carefully delineated function of reporting and withholding of players' winnings." *Id.*, p. 14 (emphasis in original); *see also id.* pp. 15-16; D. Ct. Reply Br. pp. 10 n. 7, 11. Thus, the Nations' position regarding the meaning of Section 2719(d) closely resembled the United States's position.[8] In the *Choctaw Nation* case, District Judge Burrage recognized that the Nation had not raised the Section 2719(d) exemption question and expressly refused to reach that question. *Choctaw Nation of Oklahoma v. United States*, 99-1 U.S. Tax Cas. (CCH) ¶ 70,118 (E.D. Okla. 1999), reproduced at Pet. App. p. 33a.[9] In the *Chickasaw Nation* case, Magistrate Judge

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court arguments are set forth in the Brief in Support of Plaintiff's Motion for Summary Judgment dated May 8, 1998, filed in E.D. Okla. No. CV-97-511-P ("Chickasaw D. Ct. Br."), pp. 9-16; and Plaintiff's Brief in Opposition to Defendant's Cross-Motion for Summary Judgment dated June 23, 1998, filed in E.D. Okla. No. CV-97-511-P ("Chickasaw D. Ct. Reply Br."), pp. 4-11. The Choctaw Nation's district court arguments were the same as the Chickasaw Nation's arguments.

[8] The Nations also contended in the district court that a pull-tab game is a "live game" rather than a "lottery" and, therefore, is excluded from Section 4421's definition of taxable "wagers." *See* D. Ct. Br. pp. 17-19.

[9] Judge Burrage stated:

> Plaintiff . . . does not argue that § 2719(d) provides an excise tax exemption for Indian gaming activities.

Payne did address the Section 2719(d) exemption question, but only at the invitation of the United States and only by adopting portions of the United States's proposed conclusions of law nearly verbatim. *The Chickasaw Nation v. United States*, 99-1 U.S. Tax Cas. (CCH) ¶ 70,121, at 88,759 (E.D. Okla. 1998) (conclusions of law 26 and 27), reproduced at Pet. App. 47a; *see* United States' Proposed Findings of Fact and Conclusions of Law filed May 18, 1998, in E.D. Okla. No. CV-97-511-P, pp. 10-11.

The Nations' central argument in the Tenth Circuit was that the federal wagering taxes are imposed only on "persons" as defined in Section 7701(a)(1) of the Code, and that Indian tribes are not "persons" under this definition. Chickasaw Br. pp. 10-18; Choctaw Br. pp. 10-19. As a corollary to this argument, the Nations contended that Section 2719(d) of IGRA only concerns reporting and withholding requirements and not the federal wagering taxes and, thus, does not alter the Code's exclusion of tribes from the "persons" subject to the taxes. Each Nation stated in its opening brief:

> [In Section 2719(d)], the application of the IRC is limited to only reporting and withholding as to the player's winnings.

> Indeed, in footnote 7 of Plaintiff's opposition brief, Plaintiff's states "[n]o exemption is necessary since Indian tribes are not taxable entities and are not 'persons' subject to tax." The Court therefore does not address the issue of whether § 2719(d) provides an excise tax exemption for Indian gaming activities.

99-1 U.S. Tax Cas. at 88,744.

Chickasaw Br. p. 21; Choctaw Br. p. 21. Similarly, each Nation stated in its reply brief:

> [T]he Nation is not contending that 25 U.S.C. § 2719(d) provides an exemption. No exemption is needed or claimed.

Chickasaw Reply Br. p. 8; Choctaw Reply Br. p. 8. Thus, in the Tenth Circuit, the Nations' position regarding the meaning of Section 2719(d) continued to closely resemble the United States's position.[10] The Tenth Circuit panel addressed the Section 2719(d) exemption question briefly in its opinion, but only at the invitation of the United States and only by adopting the United States's contentions without analysis or the benefit of the adversary briefing that took place in the Federal Circuit. *See The Chickasaw Nation v. United States*, 208 F.3d 871, 883 (10th Cir. 2000), reproduced at Pet. App. p. 1a; *see also id.* at 882 (recognizing that Nation contended that Section 2719(d) concerns only those "IRC provisions . . . pertaining to the reporting and withholding of taxes with respect to players' winnings").

After losing before the panel, the Nations attempted to argue that Section 2719(d) provides an exemption in their petitions for rehearing and suggestions for rehearing *en banc*, but the petitions were denied.

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[10] The Nations also made the "live game" argument they had made in the district court and made a new treaty-based exemption argument. *See* Chickasaw Br. pp. 23-29; Choctaw Br. pp. 24-30.

As discussed more fully below, the Nations' misstatement that they raised the Section 2719(d) exemption question in their appeals bears on what issues would properly be before the Court if certiorari were granted.

REASONS FOR DENYING THE WRIT

There are several reasons why certiorari is inappropriate in this case.

1. There is no square conflict in the circuits with respect to the question presented in the Nations' petition. The petition raises only one question for review: whether under the Indian canon of construction, Section 2719(d) of IGRA confers on Indian tribes the same exemption from federal wagering taxes that is provided to states under Chapter 35 of the Code. Unlike the Federal Circuit, the Tenth Circuit did not address whether the Indian canon should be applied in interpreting Section 2719(d). *See Chickasaw Nation*, 208 F.3d at 883. Thus, there is no square conflict in the circuits with respect to the question presented in the petition.

2. The Court has stated in numerous cases that certiorari is inappropriate to consider a question neither pressed nor passed upon below. *E.g., United States v. Williams*, 504 U.S. 36, 40 (1992); *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992). The question raised in the petition not only was not passed upon in either the Tenth Circuit or the district court, it also was not pressed in either of these courts. Indeed, as discussed above, the Nations never raised *any* aspect of the Section 2719(d)

exemption question in either of the lower courts.[11] While the Tenth Circuit panel did address the exemption question in its opinion, it merely adopted the United States's contentions without analysis, without the benefit of adversary briefing, and, as the Federal Circuit noted, without considering how the Indian canon of construction bears on *this* issue. *See* 210 F.3d at 1365 n. 2. Under these circumstances, certiorari is inappropriate. *See United States v. Alvarez-Sanchez*, 511 U.S. 350, 360 n. 5 (1994) (declining to depart from Court's general practice not to review claims not argued either in district court or court of appeals); *Yee*, 503 U.S. at 538 (declining to address a question because it had not been "fully litigated below, [with] the benefit of developed arguments on both sides and lower court opinions squarely addressing the question").

3. The Federal Circuit reached the correct result in *Little Six*, applying well-established rules of statutory construction requiring an examination of statutory language and legislative history *and* application of the Indian canon of construction. In its brief filed in this Court, the United States continues its efforts to harmonize Section 2719(d)'s reference to "Chapter 35" with the

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[11] The Nations' belated attempt in their petitions for rehearing to argue that Section 2719(d) provides an exemption, a point they previously conceded, was justifiably ignored by the Tenth Circuit as too late to be considered. *See, e.g., Sierra Club v. Hodel*, 848 F.2d 1068, 1100-01 (10th Cir. 1998) (party may not assert new ground for relief in petition for rehearing); *United States v. Smith*, 781 F.2d 184, 184-85 (10th Cir. 1986) (party may not use petition for rehearing to raise issue previously conceded).

"winnings" language (pp. 6-7), but even Judge Dyk's dissenting opinion from the denial of rehearing in *Little Six* concedes "there is no way to reconcile" these references in the statute. U.S. Br. App. p. 3a. The United States also persists in relying on an isolated change in the original bill language to support its position regarding Section 2719(d) (pp. 7-8), omitting to mention another change in language and other legislative history that supports the Federal Circuit's holding in *Little Six*.[12] Even Judge Dyk goes no farther in dissent than to conclude that the "legislative history here provides no clear guidance" regarding the meaning of Section 2719(d). U.S. Br. App. p. 7a. Under these circumstances, the Federal Circuit properly relied on the Indian canon of statutory construction as well as statutory language and legislative history to reach its holding regarding congressional intent.[13]

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[12] Most important in this history, Congress deliberately added "Chapter 35" to Section 2719(d) at the same time that "taxation" was removed. *Compare* 27 U.S.C. § 2719(d) *with* S. 555, 100th Cong., 1st Sess. (1987). This supports the Federal Circuit's holding, because "Chapter 35" and "taxation" had been used interchangeably during the legislative process. *See* H.R. Rep. No. 488, 99th Cong., 2d Sess. 12 (1986) (equating original "taxation" language and "Chapter 35").

[13] Despite the United States's suggestions to the contrary, this Court has never enunciated a different standard for application of the Indian canon in federal and state tax cases. *Squire v. Capoemen* is the leading federal Indian law case on statutory construction and federal taxation. There, the Court relied in part on the Indian canon to hold that a statute providing for "restrictions as to . . . taxation of such land" provided Indians with an exemption from federal income tax. 351 U.S. at 7. The statutory language of Section 2719(d) provides *stronger* support for a tax exemption than the statute at issue in

4. The conflict in outcomes between the Tenth Circuit case and the Federal Circuit case is tolerable. The Nations exaggerate in stating that the conflict in outcomes "prevents uniform application of our national scheme of taxation." Pet. p. 11. The Federal Circuit is a court of nationwide jurisdiction, and its decisions help ensure uniform application of the federal tax laws. The vast majority of tribes have not yet litigated their refund claims and presumably will pursue them in the U.S. Court of Federal Claims, which is bound by the decision of the Federal Circuit.[14] Apart from the Nations' cases, we are aware of only one other pending case, *Lower Sioux Indian Community in Minnesota v. United States*, Civ. No. 99-911 (D. Minn. filed Jun. 16, 1999), appealable to the Eighth Circuit, which presents questions regarding the applicability of the federal wagering taxes to Indian tribes. The three tribal plaintiffs in that case are seeking refunds on the basis that Section 2719(d) provides an exemption for tribal pull-tab games. Assuming the case reaches the Eighth Circuit, the Eighth Circuit may agree with the Federal Circuit that Section 2719(d) provides an

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Capoeman, because Section 2719(d) explicitly refers to Chapter 35 among the Code provisions to be applied to tribes in the same manner as to states, whereas the statute in *Capoeman* did not mention the federal income tax.

[14] In any case in which the IRS seeks to impose the Chapter 35 taxes on an Indian tribe, the tribe may contest the liability by paying the amount in dispute and bringing refund litigation either in the U.S. Court of Federal Claims or in the U.S. District Court for the district in which the tribe is located. 28 U.S.C. § 1346(a)(1) (1994). The U.S. Tax Court does not have jurisdiction to determine liability for the federal wagering taxes.

exemption, on the basis of the same established rules of statutory construction applied by the Federal Circuit.[15]

5. This case is not sufficiently important to warrant this Court's attention. The federal wagering taxes are very narrow taxes that raise a very small amount of revenue for the United States. The Treasury Department in both the Carter and Reagan administrations advocated the complete abolition of the federal wagering taxes, because they raise only "extremely minor" revenues and are a poor tool for enforcing the criminal gambling laws and therefore no longer serve their intended purpose. *See* 127 Cong. Rec. S2270-71 (Feb. 17, 1981), S32084-85 (Dec. 16, 1981). By fiscal year 1999, the wagering excise tax raised only $13.8 million, even less than the $19.8 million raised by the excise tax on bows and arrows and far less than the $6.6 billion and $21.2 billion raised by the excise taxes on air transportation and gasoline, respectively. *See* www.irs.ustreas.gov/tax_stats/soi/exc_exc.html, file 00EX20TE.EXE. Moreover, the imposition of the federal wagering taxes on tribal governments was only an afterthought of the Internal Revenue Service, which did not develop the position that tribal governments are subject to the taxes until 1992, over ten years after the tribes had begun to conduct pull-tab games. *See* IRS Tech. Adv. Mem. 9229005 (CCH) (Apr. 2, 1992) (first statement of IRS position that tribes are subject to Chapter 35 taxes).

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[15] Likewise, if any tribes choose to pursue refund litigation in the Tenth Circuit in the future and there is adversary briefing regarding the Section 2719(d) exemption question, the Tenth Circuit may decide that it agrees with the Federal Circuit.

Finally, if Congress is concerned about the Federal Circuit's interpretation of Section 2719(d), it can amend the statute without the need for intervention by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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